BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JEFFREY THOMAS MONAHAN Claimant	)	
VS.	)	
UNITED PARCEL SERVICE Respondent	)	Docket No. 1,020,714
AND	)	
LIBERTY MUTUAL INSURANCE CO. Insurance Carrier	)	

ORDER

Claimant requests review of the June 29, 2005 Order entered by Administrative Law Judge Steven J. Howard.

ISSUES

After a preliminary hearing on February 8, 2005, the Administrative Law Judge (ALJ) ordered respondent to provide claimant medical treatment. That decision was not appealed to the Board. On March 7, 2005, the respondent and insurance carrier filed a motion to terminate benefits because claimant did not give timely notice of his alleged injury. After a hearing on June 28, 2005, the ALJ entered an Order on June 29, 2005, which terminated claimant's medical treatment.

At the preliminary hearing held on February 8, 2005, respondent had denied it received timely notice and claimant testified he had told his supervisor that he had hurt his back lifting at work.[1] That testimony was uncontroverted. However, at the hearing held on June 28, 2005, the claimant's supervisor testified and denied claimant had told him he had injured his back at work or that he had made any such claims when he had called in to the answering service to report his absences from work. The supervisor testified he first

[1] At the hearing held on June 28, 2005, respondent's counsel requested, without objection, that the ALJ review claimant's testimony from the February 8, 2005 hearing before ruling on the motion to terminate. And the only evidence at the June 28, 2005 hearing related to whether claimant had provided timely notice.

learned claimant was alleging a work-related back injury when he was shown a letter dated October 5, 2004, which claimant had sent respondent.

The claimant requests review of whether the ALJ erred in terminating medical treatment. Initially, claimant argues that if the June 28, 2005 hearing was a preliminary hearing, the ALJ lacked jurisdiction because respondent did not file a seven-day notice of intent letter nor an application for preliminary hearing. Claimant argues that if the hearing was a motion hearing to terminate medical treatment then the ALJ's Order must be reversed because there was no medical evidence offered at the hearing, instead only the issue of timely notice was addressed. Claimant further argues the supervisor was available to testify at the first preliminary hearing and respondent should be estopped from relitigating issues raised at the first preliminary hearing.

Respondent argues the ALJ has the jurisdiction to modify preliminary hearing orders At the June 28, 2005 hearing, the respondent provided testimony refuting claimant's assertions regarding notice as well as whether he had worked anywhere else while working for respondent. Consequently, respondent requests the Board to affirm the ALJ's Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Initially, claimant argues the ALJ did not have jurisdiction to conduct the June 28, 2005 hearing. Although the ALJ's Order indicates the matter was a preliminary hearing the claimant argues it was a motion hearing. It is undisputed that respondent filed a Motion to Terminate Benefits on March 7, 2005 which indicated a hearing was requested to present evidence that respondent did not receive timely notice of the alleged accidental injury. The hearing was scheduled for June 28, 2005. The following colloquy occurred at the start of the June 28, 2005 hearing:

> JUDGE HOWARD: This is the claim of Jeffrey T. Monahan versus UPS and Liberty Insurance Corporation, Docket No. 1,020,714. This matter comes on for a Preliminary Hearing. Record should reflect that respondent is requesting a termination of medical authorization previously ordered under date of February 28th, 2005. It's my understanding that claimant makes claim for an occupational accident for the period 9/2 through 9/20 2004. Accident and notice were specifically denied by the respondent. Timely written claim was admitted. It's further my understanding based upon our pretrial discussions that Mr. Wallace has comments he'd like to make regarding a possible fraud and abuse charge.
>
> MR. WALLACE: That is correct, your Honor.
>
> JUDGE HOWARD: Let's take up the motion to terminate the medical authorization at this point.

MR. WALLACE: Very good.[2]

The hearing then proceeded with the testimony from claimant's supervisor refuting claimant's testimony from the February 8, 2005 preliminary hearing. As previously noted, respondent's counsel requested the ALJ review claimant's testimony from the previous preliminary hearing transcript in order to place the supervisor's testimony in context. Claimant did not object to the request.

Because there is no limit to the number of preliminary hearings that can be held in any given workers compensation matter,[3] the decision of whether a claim is compensable, i.e. whether an injury arose out of and in the course of one's employment, whether timely notice was given respondent, can change based upon the evidence offered. This ongoing review, while contrary to general civil litigation principles, is a necessary procedure in the workers compensation field.

The Kansas Supreme Court has stated that an important objective of workers compensation law is avoiding cumbersome procedures and technicalities of pleading so that a correct decision may be reached by the shortest and quickest possible route.[4] Further, the Division is not bound by technical rules of procedure but should give the parties reasonable opportunity to be heard and to present evidence, insure an expeditious hearing, and act reasonably and without partiality.[5]

The Board acknowledges that this matter came to the ALJ on respondent's Motion to Terminate Benefits. While the matter came to the ALJ on a motion, it is apparent from a review of the Motion to Terminate Benefits, the hearing transcript and the arguments of the parties that the dispute in this matter centers around whether claimant provided timely notice of his alleged accidental injury. Whether timely notice was made is a preliminary hearing issue under K.S.A. 44-534a. The Board will, therefore, treat this matter as an appeal from a preliminary hearing.

Claimant argues respondent's request to terminate temporary total disability benefits violated the provisions of K.S.A. 44-534a as respondent failed to provide notice of intent to file an application for preliminary hearing.

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[2] P.H.Trans. (June 28, 2005) at 3.

[3] *Hanna v. M. Bruenger & Co., Inc. & Leona Bruenger & Co., Inc.*, No. 222,182, 1997 WL 802901 (Kan. WCAB Dec. 19, 1997).

[4] *Pyeatt v. Roadway Express, Inc.*, 243 Kan. 200, 756 P.2d 438 (1988).

[5] K.S.A. 2004 Supp. 44-523(a); *Pyeatt*, *supra*.

First, the Board has previously held, and continues to hold, that the Division retains jurisdiction over the parties and the issues presented at the initial preliminary hearing. Therefore, later hearings conducted to address those same preliminary hearing issues are treated as a continuation of the initial hearing. That interpretation of the Act affords the parties expeditious hearings and avoids cumbersome procedures that would only serve to delay prompt decisions.

Second, if an appellate court would find that a party must file an application for a preliminary hearing and a new notice of intent every time a hearing is needed to address an ongoing preliminary hearing issue that already has been addressed, the Board finds respondent complied with such a requirement with its March 7, 2005 Motion to Terminate Benefits.

In this instance, after the claimant's testimony in the first preliminary hearing that he gave notice of his back injury to his supervisor, the respondent had that supervisor testify at the most recent hearing.

Briefly stated claimant described his job duties as including loading 70 to 150 pound packages off of a moving conveyor belt. He testified the body mechanics of moving the 70-150 pound packages off the floor or the moving belt would include lifting, pulling, twisting, turning and pivoting. Claimant began noticing problems with his lower back and right hand side being sore. He notified his supervisor, Scott Harris, that he had hurt his back due to picking up heavy packages. Claimant testified that he last worked September 20, 2004. He called in two times and left messages on the answering machine stating that he wouldn't be into work due to his back. On October 5, 2004, the claimant sent a letter to the respondent requesting medical treatment. Claimant testified he is still having spasms, sharp pain and constant soreness in his lower back.

At the preliminary hearing on June 28, 2005, Mr. Scott Harris, claimant's supervisor, testified he received notice of the accident by way of claimant's letter dated October 5, 2004. Mr. Harris testified the claimant was on vacation for the most of September 2004 but he worked the 23rd, 24th and the 27th. Mr. Harris further testified the claimant advised him that while on vacation the claimant did some framing work.

As previously noted, after the second hearing the ALJ terminated medical treatment for claimant. Because the only issue addressed at the second hearing was whether claimant had provided timely notice of his accident, it is implicit in the ALJ's Order that he determined claimant had not provided timely notice.

The Workers Compensation Act requires workers to give notice of their accidental injury within 10 days of when it occurs.[6] In this case, the claimant alleged a repetitive

[6] K.S.A. 44-520.

trauma injury and alleged the injury continued from September 2, 2004, through his last day worked on September 20, 2004. At the February 8, 2005 preliminary hearing, claimant had incorrectly testified that September 20, 2004, was his last day worked. However, at the hearing on June 28, 2005, the claimant's supervisor reviewed claimant's attendance record which revealed the actual last day the claimant worked was September 27, 2004.

The Kansas Supreme Court, in *Treaster*[7] ruled that an appropriate date of accident to be utilized in microtrauma cases is the last day of work. In this case, the evidence establishes that claimant's last day worked was September 27, 2004.

The letter from claimant to respondent, which indicated claimant was alleging a series of accidents, was dated October 5, 2004. The claimant's supervisor testified he had seen the letter within a few days of that date. Because the date of accident would be September 27, 2004, for the alleged series of accidents, this notice would be within the 10-day statutory notice requirement which extended until October 11, 2004. Consequently, the Board concludes claimant provided timely notice.

WHEREFORE, the Order of Administrative Law Judge Steven J. Howard dated June 29, 2005, is reversed.

IT IS SO ORDERED.

Dated this _____ day of September 2005.

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BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
Stephanie Warmund, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[7] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).